No. 86-218

Supreme Court, U.S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1986

DALE WALKER, SHARON PATCHETT, DANNY DILL, THE ESTATE OF WILLIAM THOMAS, THE ESTATE OF STANLEY COLE, and THE ESTATE OF ROBERT CONKLE,

Petitioners,

v.

CHARLES ROWE and DAVID SANDAHL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the deliberate indifference of Respondents to a developing prison riot renders them liable under 42 U.S.C. §1983 to Petitioners who suffered injury and death during the riot?

II. Whether state-provided post-deprivation remedies bar a suit brought under 42 U.S.C. §1983 by prison guards against a Director of Corrections and an Assistant Warden?

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

No.

DALE WALKER, SHARON PATCHETT, DANNY DILL, THE ESTATE OF WILLIAM THOMAS, THE ESTATE OF STANLEY COLE, and THE ESTATE OF ROBERT CONKLE,

Petitioners,

v.

CHARLES ROWE and DAVID SANDAHL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Dale Walker, Sharon Patchett, Danny Dill, The Estate of William Thomas, The Estate of Stanley Cole, and The Estate of Robert Conkle respectfully petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review that court's judgment of May 19, 1986 in *Walker* v. *Rowe,* No. 85-2057 (7th Cir. May 19, 1986).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is not officially reported at this time. The unofficial citation is *Walker* v. *Rowe,* No. 85-2057 (7th Cir. May 19, 1986). A copy of the opinion is included with this Petition as Appendix A.

The opinion of the United States District Court for the Northern District of Illinois is not officially reported at this time. The unofficial citation is *Walker* v. *Rowe,* No. 80 C 5310 (N.D. Ill. May 20, 1985). A copy of the opinion is included with this Petition as Appendix B.

The opinion of the United States District Court for the Northern District of Illinois on the respondents' motion to dismiss is reported at *Walker* v. *Rowe,* 535 F.Supp. 55 (N.D. Ill. 1982). A copy of the opinion is included with this Petition as Appendix C.

JURISDICTION

The date of judgment of the Court of Appeals was May 19, 1986. Judgment was entered on the same date. This Court has jurisdiction under 28 U.S.C. §1254.

CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMENDMENT XIV, §1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

The petitioners or their decedents were guards who were injured or killed during a prison riot at the Pontiac Correctional Center, Pontiac, Illinois, on July 22, 1978. The Pontiac Correctional Center is a maximum security facility housing the most dangerous adult male inmates in the state correctional system.

The respondents are Charles Rowe, Director of the Illinois Department of Corrections at the time of the riot, and David Sandahl, then Assistant Warden of Operations having responsibility for security at the institution.

Having pursued various remedies available to them under Illinois law, the petitioners obtained jurisdiction in the instant cause of action under 42 U.S.C. §1983 alleging 1) that a plethora of institutional and operational deficiencies at Pontiac led and contributed to their injuries or deaths, and 2) that the failure of the respondents to act to correct such deficiencies amounted to an unconstitutional deprivation of life and liberty without due process of law.

During the course of the trial in federal district court, the jury heard considerable evidence, often disputed by the respondents, about the problems plaguing Pontiac prison. These problems included inadequate personnel training, overcrowding, inadequate and broken equipment, understaffing, acute staff absenteeism, poor communications procedures among staff, official ignorance of or indifference to forewarnings of the riot, official ignorance of the production and movement of weapons among the prisoners, areas in the prison which were outside visual or radio contact, gang activity, the absence of the warden, the assistant wardens, and the duty warden from the prison at the time the riot broke out, and inadequate response to the riot by managerial personnel when they finally made their appearance.

The trial court denied the respondents' motion to dismiss (Appendix C). The jury was instructed that in order to find that one of the defendants deprived one of the plaintiffs his or her life or liberty without due process of law, it must find that the defendant acted or failed to act either knowing that his act or omission would endanger the plaintiff, or with deliberate or reckless indifference to that plaintiff's safety. The jury, aware of the compensation due the petitioners by virtue of their state law remedies, awarded verdicts in favor of the petitioners totaling $706,845. The trial court subsequently denied the respondents' motion for judgment N.O.V. and awarded petitioners' counsel fees and costs of $145,792.50 under 42 U.S.C. §1988 (Appendix B).

The Court of Appeals reversed the judgments (Appendix A). Their opinion is discussed below.

REASONS FOR GRANTING THE WRIT

I. WHETHER THE DELIBERATE INDIFFERENCE OF RESPONDENTS TO A DEVELOPING PRISON RIOT RENDERS THEM LIABLE UNDER 42 U.S.C. §1983 TO PETITIONERS WHO SUFFERED INJURY AND DEATH DURING THE RIOT?

Actions arising under 42 U.S.C. §1983 are a species of tort, *Imbler* v. *Pachtman*, 424 U.S. 409, 417, 96 S.Ct. 984, 988, 47 L.Ed.2d 128, 136 (1976). While the statute is not intended to supplant state tort law, the similarities between tort analysis and §1983 analysis are sufficiently close for Justice Stevens to state, "The atrocities that concerned Congress in 1871 plainly sounded in tort. Relying on this premise we have found tort analogies compelling in establishing the elements of a cause of action under §1983." *Wilson* v. *Garcia*, 471 U.S. ....., 107 S.Ct. ....., 85 L.Ed.2d 254, 267 (1985). Accordingly, the lower courts have subjected this §1983 action to analysis in terms of the traditional tort concepts of duty and proximate cause. For the jury, the respondents' duty, stated negatively, was to not act with deliberate or reckless indifference to the petitioners' safety. The jury found for the petitioners, and the trial court subsequently held that the verdict was consistent with the evidence. App. B. When the Seventh Circuit analyzed this case, however, it concluded that the respondents owed no duty to the petitioners, but it did so against a backdrop of conflicting precedents.

The idea that the state has an affirmative duty to protect others in certain circumstances can be traced to at least two sources: *Estelle* v. *Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), and *Martinez* v. *California*, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980). *Estelle*

concerned the failure of prison officials to provide medical care to an inmate. There, the Supreme Court held that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' [citation omitted] proscribed by the Eighth Amendment," 429 U.S. at 104, and that the government had an "obligation to provide medical care for those whom it is punishing by incarceration," *Id.* at 103. In *Martinez,* the victim of state inaction was not in custody but was a private citizen murdered by a parolee five months after he was released. While the Court did not deal directly with the issue of whether the state had a duty to protect the victim, *Martinez* permits the inference of two criteria which federal courts occasionally apply to determine whether there is a "special relationship" between the state and the victim which would invoke a constitutional duty to protect. The first is whether the state was aware that the victim, as distinguished from the public at large, faced any special danger, and the second is how closely the danger to the victim is linked to the acts of the state, 444 U.S. at 285. An examination of how federal courts have applied or departed from these concepts reveals the conceptual thicket which has grown since *Estelle* and *Martinez* were decided.

In the Seventh Circuit, the Court of Appeals first faced the issue of an affirmative duty to protect in *Bowers* v. *DeVito,* 686 F.2d 616 (7th Cir. 1982), confronting facts much like those in *Martinez*: a state mental hospital released a patient who murdered a woman. The Court introduced a new criterion for determining when a constitutional duty to protect arises, and did so by melding the Eighth and Fourteenth Amendments to conclude that

the state need take action to protect only those whom it has put in a position of danger, *Id.* at 618.

The following year, the Court of Appeals in the Fourth Circuit dealt with the same issue in a case brought by victims of a set of vicious assaults committed by a man who remained on parole despite his parole officers' knowledge and suspicion of other criminal acts committed since his release. The Court in *Fox* v. *Custis,* 712 F.2d 84 (4th Cir. 1983), cited *Bowers* approvingly but ultimately applied *Martinez,* finding the injuries complained of "too remote" from the conduct of state actors to be actionable under §1983, and determining that the defendants were unaware that the claimants faced any special danger, 712 F.2d at 87, 88.

While *Martinez* never used the term "special relationship" to connote those not in custody which the state had a duty to protect, *Fox* did, and the term came into frequent use. The Tenth and Eleventh Circuits undertook an examination, in *Humann* v. *Wilson,* 696 F.2d 783 (10th Cir. 1983) and *Wright* v. *City of Ozark,* 715 F.2d 1513 (11th Cir. 1983), not just of the relationship between the victim and the state, but between the victim and the criminal as well, apparently to determine whether state officials should have inferred any special danger to the victims as distinguished from the public at large. Such an analysis is implied by *Martinez,* since the state's knowledge of the relationship between the victim and the criminal is an obvious factor in whether the state is aware of any special danger faced by the victim as distinguished from the public at large. An inquiry into the victim's relationships to the state and the criminal was also undertaken in *P.L.C.* v. *Housing Authority of the County of Warren,* 588 F.Supp. 961 (1984). This case arose from

the rape of a resident of public housing by an employee of the Housing Authority. Two of the factors which the court said were critical of its determination of the victim's special relationship with the Authority were that citizens would actively seek out public housing provided by the Authority, and that the Authority controlled the premises involved, including the provision of security equipment, *Id.* at 965.

What is notable about *P.L.C.* is that the analysis, inferable from *Martinez*, employed factors which, if considered by the Seventh Circuit in the present case, were used here to disqualify the petitioners from recovery under §1983. The voluntary acceptance of habitation in *P.L.C.* is clearly analogous to the voluntary acceptance of employment cited by the Seventh Circuit as a disqualifying factor. Would-be residents in *P.L.C.* presumably had to decide whether to take an apartment with a given mix of rent and security, as the guards here accepted employment with a given mix of pay and security. The court in *P.L.C.* apparently held, however, that the fact the victim had accepted the mix offered by the Authority does not mean that she accepted deprivations of life and liberty interest due to the reckless indifference of officials. Obviously, widely divergent criteria are being used by the federal courts for deciding the same issue on analogous facts.

While the Fourth Circuit in *Fox* followed *Martinez* closely, a year later that court took a much different approach in *Jensen* v. *Conrad*, 747 F.2d 185 (4th Cir. 1984). *Jensen* never reached a resolution of the affirmative duty issue, relying for its holding on other grounds. It does specify three factors, however, "that should be included in a 'special relationship' analysis," 747 F.2d at 194, n. 11.

These are 1) whether the victim or perpetrator was in legal custody at the time of or prior to the incident; 2) whether the state has expressly stated its desire to provide affirmative protection to a particular class or specific individuals; and 3) whether the state knew of the claimants' plight, *Id.*

Note that of the three criteria, only the third survives from *Martinez.* Note, too, that had the Seventh Circuit applied these criteria instead of its own to the present case, a special relationship would have been established. First, the perpetrators (the prisoners) were in custody at the time of the incident. Second, the state had expressed the desire to protect prison guards. See 38 Ill. Stat. ¶1003-7-4 (directing the Department of Corrections to establish rules and regulations for the protection of employees and inmates); 48 Ill. Stat. ¶137.3, §3(a) (imposing the duty on every employer under the Act to provide reasonable protection to the lives, health and safety of employees and to furnish employment and a place of employment which are free from recognized hazards that are likely to cause death or serious physical harm to employees). See also 38 Ill. Stat. ¶1003-6-4 (authorizing guards to use whatever suitable means necessary to defend themselves). Third, the state knew of the potential for more than the usual amount of violence. This criterion raises a fact question which is affirmatively resolved by the record.

Last year, the Seventh Circuit decided a case regarding the state's duty to protect which stands in marked contrast to the present case. *Ellsworth* v. *City of Racine,* 774 F.2d 182 (7th Cir. 1985), concerned the wife of a threatened policeman who alleged that the City had failed to

protect her adequately. The Court of Appeals found no constitutional duty on the City to protect her, though it did discern the presence of an undefined "limited special relationship" between the City and the family, *Id.* at 186. The Court also left open the possibility, arguably foreclosed by the present case, that "there may be situations when a municipal employee and the municipality have, by virtue of the employment relationship a special relationship for purposes of §1983. In that case, the municipality would have a constitutional duty to provide elementary protective services to the employee," *Id.* In a concurrence, Judge Coffey noted "the due process clause of the Fourteenth Amendment encompasses a right to be free from 'unjustified intrusions on personal security,'" citing *Ingraham* v. *Wright,* 430 U.S. 651, 673, 97 S.Ct. 1401, 1413, 51 L.Ed.2d 711 (1976). *Id.* at 187. Judge Coffey, applying *Martinez,* concluded that there was a special relationship, though no liability because the plaintiff was unguarded at the time of the attack due to her own statement that a guard need not stay with her. What is remarkable when one compares *Ellsworth* to the present case is that two panels of the same circuit, one year apart, both with the same precedential background, employ such divergent analyses on the same issue.

With this last case, we reach 1986 and see that there is still little agreement among the circuits about the principles which are to govern this area of federal law. *McClary* v. *O'Hare,* 786 F.2d 83 (2d Cir. 1986), involves a state highway employee killed by faulty equipment operated by uncertified personnel. The Court's criterion for whether there was a duty on the state to protect is whether the victim was in the state's custody or control, *Id.* at 88. This is not a standard derived from *Martinez,*

but it would permit recovery if applied to the petitioners here. Yet the Court veers from this standard to one far more stringent when it summarizes its holding by stating that reckless acts of government employers do not give rise to substantive due process violations unless the challenged conduct is "uniquely governmental in character," *Id.* at 89, n. 6.

It is obvious from this examination of cases that the law regarding a state's affirmative duty to protect others is in considerable disarray, and that standards are evolving without any discernable constitutional moorings. Compounding the problem of a lack of uniformity is an important federal question arising out of the present case as well as from *McClary*. That question is, simply put, who shall have access to the §1983 remedy?

The statute itself would seemingly make an answer to this question a simple matter: recovery may be had by "any citizen of the United States or other person within the jurisdiction thereof." 42 U.S.C. §1983. Nevertheless, varying applications of the tort concepts of duty and of proximate cause by the circuits have led to the practical and economic result that entire groups of people are effectively excluded from §1983 recovery. In the present case, the Seventh Circuit makes it clear that prison guards may not recover from the respondents under §1983 for official negligence, deliberate indifference, or even gross negligence. App. A, 5. The Court of Appeals further suggests that, since the guards assumed their jobs voluntarily and the state has not placed them in danger, the state owes them no duty. Thus, in the Seventh Circuit, prison officials have an effective absolute immunity from §1983 suits brought by prison guards.

In addition, the Seventh Circuit's exclusion of state prison guards from access to §1983 remedies, public employees have been likewise excluded in the Second Circuit in *McClary,* unless the challenged conduct is "uniquely governmental in character," 786 F.2d at 89, n. 6. Even intentional deprivations of life and liberty are not actionable by public employees if private employers could conceivably be guilty of the challenged conduct.

The Seventh Circuit also dealt with the issue of proximate cause, stating "the defendants did not kill or injure the guards; prisoners did, and this makes all the difference." App. 5. This premise runs contrary to the rule that §1983 does not specifically require "personal participation" as an element of causation, but makes liable those persons who subject or cause others to be subjected to a deprivation of rights, *Sims* v. *Adams,* 537 F.2d 829 (5th Cir. 1976). See also *Smith* v. *Ross,* 482 F.2d 33 (6th Cir. 1973) (holding that a law enforcement officer can be liable under §1983 when by his inaction he fails to perform a statutorily imposed duty). The Constitution is not only a "constraint on the state's power to act," as the Seventh Circuit argues, App. A, 5, but is also a constraint on the state's *failure* to act. See *Estelle* v. *Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). Nor does *Martinez* v. *California,* 444 U.S. 277, 285 (1980), support the Seventh Circuit's point on this issue, since the Supreme Court left open the possibility that there may be a proximate relation between injury and cause in a circumstance involving action taken in connection with the release of a prisoner on parole, *Id.* at 285.

II. WHETHER STATE-PROVIDED POST-DEPRIVATION REMEDIES BAR A SUIT BROUGHT UNDER 42 U.S.C. §1983 BY PRISON GUARDS AGAINST A DIRECTOR OF CORRECTIONS AND AN ASSISTANT WARDEN?

Implicit in the opinion of the Seventh Circuit is the premise that the remedies provided by state law to the petitioners are adequate to redress their injuries. This Court has clearly recognized, however, that it is not appropriate for state officials to determine the adequacy of remedies for constitutional wrongs committed by other state officials. As was emphasized in *Mitchum* v. *Foster,* 407 U.S. 225, 242, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972), the very purpose of §1983 was to interpose the federal courts between the state and the people, as guardians of the people's rights. This appreciation of the role of the federal courts as guardian of our rights was affirmed in *Davis* v. *Passman,* 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979), in which the Court stated that justiciable constitutional rights are to be enforced through the courts. It cannot now be seriously maintained that it is to be the duty of appointed workers' compensation commissioners to remedy due process violations. The Illinois Workmen's Compensation Act, Ill. Rev. Stat. 1979 ch. 48, §138.5(a), for example, precludes common law or statutory remedies by employees against their employers, but does not address constitutional issues. Even the legislature recognizes, as this Court has, that once a constitutional violation is found, it is for the federal courts to tailor the scope of the remedy to fit the nature and extent of the violation. *Hills* v. *Gautreaux,* 425 U.S. 284, 96 S.Ct. 1538, 47 L.Ed.2d 792 (1976). Further, it is plain that Congress did not intend for state agencies or courts to be the arbiters of ade-

quate federal remedies, See *Patsy* v. *Bd. of Regents,* 457 U.S. 496, at 502-508, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982).

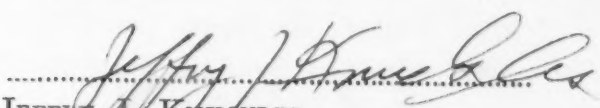
Seemingly against this clearly articulated Congressional and judicial intent stands *Parratt* v. *Taylor,* 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). Yet, *Parratt* is limited by its facts to negligent deprivations of property. *Hudson* v. *Palmer,* ..... U.S. ....., 104 S.Ct. 3194 (1984). *Parratt* has never been extended by this Court to procedural due process violations of life and liberty interests. Whether it should be so extended is an issue upon which there is disagreement among the circuits. See, *e.g., Wilson* v. *Beebe,* 770 F.2d 578 (6th Cir. 1985); *Daniels* v. *Williams,* 748 F.2d 229, 232 (4th Cir. 1984) (*en banc*), cert. granted, ... U.S. ....., 105 S.Ct. 1168, 84 L.Ed.2d 320 (1985); *Thibodeaux* v. *Bordelon,* 740 F.2d 329 (5th Cir. 1984) (favoring extensions); but see *Gilmore* v. *City of Atlanta,* 774 F.2d 1495 (11th Cir. 1985); *Hicks* v. *Feeney,* 770 F.2d 375 (3rd Cir. 1985); *Haygood* v. *Younger,* 769 F.2d 1350 (9th Cir. 1985) (all opposing extension).

Thus, whether state-provided post-deprivation remedies bar this suit and if so, who shall decide whether a given remedy is "adequate", present important federal questions upon which there are conflicts among the circuits. The need for Supreme Court guidance on these issues is clear.

CONCLUSION

For the foregoing reasons, certiorari should be granted to review the judgment of the Court of Appeals.

Respectfully submitted,



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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 85-2057
DALE WALKER, et al.,

Plaintiffs-Appellees,

v.

CHARLES ROWE and DAVID SANDAHL,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80 C 5310—William T. Hart, *Judge.*

ARGUED APRIL 18, 1986—DECIDED MAY 19, 1986

Before CUMMINGS, *Chief Judge,* EASTERBROOK, *Circuit Judge,* and NOLAND, *District Judge.**

EASTERBROOK, *Circuit Judge.* The Pontiac Correctional Center is the maximum security prison of Illinois. On July 22, 1978, inmates of Pontiac who were being returned to their cells after exercise in the courtyard killed three guards, injured others, and set fire to part of the prison. Three of the injured guards, and the estates of the three deceased guards, filed this suit against Charles Rowe, then the Director of the Illinois Department of Corrections, and David Sandahl, the Assistant Warden of Opera-

* The Honorable James E. Noland, Chief Judge of the United States District Court for the Southern District of Indiana, is sitting by designation.

tions at Pontiac. They contended that Rowe and Sandahl (together with others since dismissed from the suit) deprived them of their constitutional right to a safe working environment. The jury returned verdicts aggregating $706,845, to which the district court added $145,792 in attorneys' fees and costs. These recoveries came on top of workers' compensation awards and other benefits afforded by state law.[1] Because we conclude that the constitution is not a code of occupational safety, we reverse the judgments.

I

One preliminary matter. The defendants maintain that the suit is one against the state and therefore barred by the eleventh amendment. Certainly so if the suit is against the defendants in their "official capacity," but the "capacity" in which litigation proceeds is largely the plaintiff's choice. If the theory is that the defendant occupied a given office, and the occupant of that office had a duty (one attaching to any occupant of the office) to do such-

[1] The estates of two guards recovered burial expenses plus $250,000 apiece in workers' compensation death benefits. See Ill. Rev. Stat. ch. 48 §138.7. The third estate was eligible for this benefit but did not request it. All three estates received death benefits under life insurance policies paid for by the state, and all were entitled to an extra $20,000 under the Illinois Law Enforcement Officers and Firemen's Act, Ill. Rev. Stat. ch. 48 §281-85. The three injured guards received their full salaries during their recuperation, under the Disability from Injuries in Line of Duty Act, Ill. Rev. Stat. ch. 70 §91. The state was required to pay the full medical expenses of the injured guards under the workers' compensation program, and the parties settled these claims for lump sums. All six plaintiffs also pursued their remedy in the Illinois Court of Claims. The court dismissed their suit, holding the workers' compensation remedies exclusive. *Thomas v. Illinois*, 33 Ill. Ct. Cl. 289 (1980). The guards also could have sued the prisoners who did the deeds, but they did not, doubtless thinking the prisoners judgment proof.

and-such, then we have an "official capacity" suit. It avoids the immunities that apply to "individual capacity" suits but is likely to be brought up short by the eleventh amendment. See *Kentucky v. Graham,* 105 S. Ct. 3099, 3105-06 (1985). If the theory is that the defendant did something that is tortious independent of the office the defendant holds, we have an "individual capacity" suit.

The plaintiff may plead a claim either way, and if he pleads what is naturally an official capacity suit as an individual capacity suit, he avoids the eleventh amendment but confronts a fatal problem—inability to prove personal responsibility. *Duckworth v. Franzen,* 780 F.2d 645, 649-50 (7th Cir. 1985). The plaintiff who says that the occupant of a given office should have done something (by virtue of office) but neglected to do it fails for two reasons: most provisions of the bill of rights do not forbid simple neglect, see *Daniels v. Williams,* 106 S. Ct. 662 (1986) (due process); *Whitley v. Albers,* 106 S. Ct. 1078 (1986) (eighth amendment), and the constitution does not make supervisory officeholders vicariously liable for the acts and omissions of their subordinates, see *Ustrak v. Fairman,* 781 F.2d 573, 575 (7th Cir. 1986); *Duckworth,* 780 F.2d at 650; *McKinnon v. City of Berwyn,* 750 F.2d 1383, 1390 (7th Cir. 1984).

Many of the grounds on which the guards sought to collect damages fail because, if they do not seek to attach liabilities to the office, they seek to hold the defendants responsible for the acts or omissions of others. The plaintiffs say, for example, that Pontiac was unsafe because:

- The prison had "dead spots" hidden from guard towers
- There were too few guards, and 56 authorized positions were vacant because of high turnover
- The prison was overcrowded, with 1,962 inmates in 1,200 cells
- Some of the inmates had formed gangs, and in general "the inmates clearly were in charge" of the prison

- The phone system was new, hard to use, and had defects
- The door and "cage" in the North Cell House were old and flimsy
- The guards did not receive enough training in controlling riots, and the existing training was poor

These and similar complaints have to do with the prison system as a whole. They do not fix individual responsibility on Director Rowe, who did not design a prison with "dead spots," or on Assistant Warden Sandahl, who could not refuse to accept prisoners committed by the courts. They are either attempts to fasten liability on the office, which the eleventh amendment forbids, or attempts to impose vicarious liability on Rowe and Sandahl. Either way, these complaints cannot be the foundation of liability.

II

Some of the acts in question are at least colorably the personal responsibility of the defendants. The jury might have found the following, among other things, and it might have connected these to the decisions of Rowe and Sandahl:

- Although Pontiac had metal detectors, they were not operational
- Although prisoners were known to make weapons in the metal shop, prison officials did not conduct enough random shakedowns of the inmates' cells to find the weapons, and the request of the guards' union for more shakedowns was "not immediately accepted"
- Although Sandahl should have known that the prison was tense, he allowed it to operate on a normal routine instead of "locking down" the prison (that is, locking inmates in their cells)
- When Sandahl (who was at home) learned that a riot was in progress, he did not immediately issue shotguns to the tactical squad and order

> it to quell the disturbance; instead Sandahl put Major Lowery in charge, and Major Lowery did not issue shotguns until Sandahl arrived and ordered their issuance more than an hour later

Our question is whether acts and omissions of this character, which arguably increased the danger to which the guards were exposed, violate the constitution. The district court held that they do, both before trial, when it denied a motion to dismiss, see 535 F. Supp. 55, 58 & n.5 (N.D. Ill. 1982), and after trial, when it denied a motion for judgment n.o.v. We may assume that Rowe and Sandahl knew that these acts and omissions increased the risk of injury facing the guards and after full deliberation decided to do nothing. We may assume that the decision to accept these risks was negligent, meaning that the costs of reducing the risks were less than the benefits (the harms avoided, discounted by the probability that there would be a riot). We may even assume that the decision to accept these risks was grossly negligent (meaning that the costs were substantially less than the anticipated benefits). The answer to the question is no, under any of these assumptions.

The defendants did not kill or injure the guards; prisoners did, and this makes all the difference. See *Martinez v. California,* 444 U.S. 277, 285 (1980). To see why, consider the language of the due process clause of the fourteenth amendment, on which the guards rely: "[N]or shall any State *deprive* any person of life, liberty, or property, without due process of law . . ." The constitution requires that the state to grant "process" before it deprives people of life, liberty, or property. It is a constraint on the state's power to act, a prohibition on the misuse of official power. *Daniels v. Williams,* 106 S. Ct. at 665-66. It does not require the state to guarantee life, liberty, or property against invasion by private actors; it requires only that the state not act, unless with due process, when life, liberty, or property are in the balance.

"Due process" does not mean "due care." *Davidson v. Cannon,* 106 S. Ct. 668, 670 (1986). We concluded in *Bowers v. DeVito,* 686 F.2d 616 (7th Cir. 1982), that because the bill of rights is a charter of negative liberties, the state need not protect people from danger. See also *Hinman v. Lincoln Towing Service, Inc.,* 771 F.2d 189, 194 (7th Cir. 1985). *Bowers* held that the state has no constitutional obligation to keep aggressive people out of free society. Subsequent cases have held, among other things, that the police have no constitutional duty to save people in danger. *Beard v. O'Neal,* 728 F.2d 894, 899 (7th Cir.) (person known to be threatened by criminal), *cert. denied,* 105 S. Ct. 104 (1984); *Jackson v. City of Joliet,* 715 F.2d 1200 (7th Cir. 1983) (person in burning car), *cert. denied,* 465 U.S. 1049 (1984). The bill of rights is designed to protect people from the state, not to ensure that the state supplies minimum levels of safety or comfort.

Governments regularly sacrifice safety for other things. A city may decide to spend more money on parks or education and less on police, even though its officials know that the expenditure on police would reduce the cost of crime by more than the expenditure on the police. It may do this without answering in damages to people subsequently mugged in the parks. The police department may decide to hire more police and give each one less costly equipment. One predictable result is that the police will suffer more auto accidents in high speed chases than they would if the city used sports cars as patrol vehicles. The city may choose the kind of car it will furnish to the police without explaining to a jury in a §1983 suit why it picked Chevrolet sedans rather than safer and faster Audi 5000 Turbo Quattros. The level of safety to be provided *by* the police to the people—like the level of safety to be provided *to* the police and prison guards—is determined by political and economic forces, not by juries implementing the due process clause. People through the democratic process may choose more or less "crime in the streets" by altering their support of the police, the courts,

social welfare programs, and economic policies stimulating growth; so too they may alter their support of safety programs for prison guards. And they may choose how to deal with the risks that inhere in prisons—they may choose to provide greater safety through designing new prisons and doubling the number of guards, or they may choose to afford remedies such as workers' compensation, insurance, and special payments to injured guards.

The safety of guards and other employees of the state is affected as much by the guards themselves as by the choices made by the state. Would-be guards must decide whether to take the job—with a given mix of salary, safety, and compensation for injury—or to seek work elsewhere. The state may not dragoon people to be guards. Would-be guards, represented by their labor unions, may decide to accept a little less safety in exchange for a little higher pay. Cf. *Camacho v. Ritz-Carlton Water Tower,* 786 F.2d 242 (7th Cir. 1986). Having decided that the combination of pay, benefits, and safety is satisfactory, the guards cannot turn around and say that the constitution required that safety be a larger component of the total package. The constitution no more assures a safe job than it does a job with a generous salary. Cf. *Vance v. Bradley,* 440 U.S. 93, 101-02, 106-09 (1979).

The constitution does not assure employees of the government better terms or working conditions or amenities than those available in private employment. *May v. Evansville-Vanderburgh School Corp.,* No. 85-2234 (7th Cir. Apr. 1, 1986), slip op. 4-8. True, some portions of the constitution regulate the public employment relationship. For example, a public employee may not be fired for speech on matters of public concern, and he must be given an appropriate hearing before being fired if he has a "property" interest in his job. But none of these particular rules is involved in this case. We therefore hold that the due process clause does not assure safe working conditions for public employees. Accord, *McClary v. O'Hare,*

786 F.2d 83, 88-89 (2d Cir. 1986).[2] Cf. *Hayes v. Vessey*, 777 F.2d 1149, 1151-52 (6th Cir. 1985) (assuming that an employee has a constitutional right to be free of rape in the workplace but holding that workers' compensation remedies under state law are sufficient "process" for unauthorized, criminal acts at work). See also *Daniels v. Williams, supra; Baker v. McCollan*, 443 U.S. 137 (1979); and *Paul v. Davis*, 424 U.S. 693 (1976), all holding that the constitution does not duplicate duties of care in the common law of torts.

This conclusion may seem in tension with the rule that the state must protect prisoners and others in its charge. See *Davidson v. Cannon* (assuming that harm caused by an attack that could have been prevented, but because of wrongful intent or deliberate indifference was not, might be basis of liability under the due process clause); *Watts v. Laurent*, 774 F.2d 168, 172 (7th Cir. 1985) (holding this), *cert. denied*, 54 U.S.L.W. 3630 (U.S. Mar. 24, 1986); *Estelle v. Gamble*, 429 U.S. 97 (1976) (eighth amendment requires state to exercise some care in affording medical assistance to prisoners). See generally

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[2] *McClary* was brought by the estate of a construction worker killed when a wire cable on a crane broke, bringing the boom down on the worker. The estate argued that the state "deliberately disregarded and violated state laws, rules, and regulations for occupational safety and the operation of mobile cranes thereby creating a high risk of danger to the decedent" (786 F.2d at 85). The Second Circuit held that even "deliberate" exposure of public employees to "high risk" does not violate the constitution because it is not an abuse of governmental power. "[W]hatever abuses O'Hare committed were abuses of authority that he held as an employer; identical actions could have been carried out by a private employer . . . . We do not think that improper actions taken by employers violate an employee's [constitutional] rights simply because the employer is a government official." *Id.* at 89.

Duckworth v. Franzen, 780 F.2d at 651-56. The district court drew on these and related cases when denying the defendants' motion for judgment n.o.v., stating that although these "deliberate indifference" cases are based on the eighth amendment, "the broader due process analysis is not limited to prisoners." It is not "limited to prisoners," but it is limited by the rationale for requiring the state to furnish protection. These cases are based on the principle that when the state takes someone into its care or cuts off sources of private aid, the state must afford replacement protection. So when the state imprisons a person and prevents his ambling down to the family physician, the state must provide some medical care. When the state arrests the adult having custody of a child, the state had better take care of the child. *White v. Rochford,* 592 F.2d 381 (7th Cir. 1979). Sometimes we shorten this inquiry to a search for a "special relationship" between the state and the person to be protected. *Ellsworth v. City of Racine,* 774 F.2d 182, 185 (7th Cir. 1985), *cert. denied,* 106 S. Ct. 1265 (1986). Whatever the name, the rationale lies in constraints the state imposes on private action. As the court put the point in *Bowers,* 686 F.2d at 618, all of these cases are variations on the principle that "[i]f the state puts a man in a position of danger from private persons and then fails to protect him . . . it is as much an active tortfeasor as if it had thrown him into a snake pit." If a press gang had picked up people from the streets and forced them to be guards at Pontiac, this line of cases would require the state not to be indifferent to the guards' working conditions. But the state did not draft its guards; they enlisted, on terms they found satisfactory, and they were free to quit whenever they pleased. The state must protect those it throws into snake pits, but the state need not guarantee that volunteer snake charmers will not be bitten. It may not throw Daniel into the lions' den, but if Daniel chooses to be a lion tamer in the state's circus, the state need not separate Daniel from his charges with an impenetrable shield.

A contrary holding would make the warden's life parlous indeed. The guards say that Director Rowe and Assistant Warden Sandahl must pay damages because they did not have enough "shakedowns" of cells in 1978 looking for

weapons. But until the Supreme Court decided *Hudson v. Palmer,* 104 S. Ct. 3194 (1984), a warden risked liability to the prisoners under the fourth amendment every time he ordered a shakedown. The guards say that Sandahl should have "locked down" the prison to reduce the risk of violence. But Pontiac had been locked down for six of the ten weeks preceding the riot, and the eighth amendment may have something to say about keeping prisoners locked two to a cell for weeks or months on end out of an unverifiable fear that if they were let out to exercise there might be trouble. Compare *Caldwell v. Miller,* No. 84-2522 (7th Cir. May 8, 1986), with *French v. Owens,* 777 F.2d 1250, 1251-56 (7th Cir. 1985). The guards say that Sandahl, reached by phone at home, should have ordered the tactical squad to be armed with shotguns and sent into the troubled part of the prison immediately. But if the shotguns had been used, Sandahl quickly would have been charged with constitutional torts against the victims. *Whitley v. Albers* holds that prison officials may use weapons to quell disturbances if they reasonably conclude that this is the best way to save the lives of all; the Court did not hint that orders hastily issued from an Assistant Warden's living room would meet this standard.

Pontiac is a den of murderers, rapists, and others with no respect for the law—and all too often nothing to lose from further mayhem. Cf. *United States v. Fountain,* 768 F.2d 790, 793-94, 803-04 (7th Cir. 1985). If there are few guards, the prisoners will murder each other; if the guards are present in abundance, the guards may become the targets; if the guards lock the prisoners in their cells, all will suffer to prevent violence by a few. There is no solution within the reach of a federal court, no easy recourse in the due process clause of the fourteenth amendment. The state has many choices, all costly, many bound to end in tragedy for someone. It may make these tragic choices for itself.

REVERSED

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT EASTERN DIVISION

Case Title

Dale E. Walker, et al.,

v.

Charles Rowe, etc. et al.,

Docket Number
80 C 5310
Name of Judge
WILLIAM T. HART

[x] Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

[ ] Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that judgment is hereby entered on the jury verdicts in favor of plaintiff, Dale E. Walker, in the amount of $57,665 as actual damages; in favor of plaintiff, Sharon D. Patchett, in the amount of $38,350 as actual damages; in favor of plaintiff, Estate of William N. Thomas, in the amount of $120,000 as actual damages; in favor of plaintiff, Danny Dill, in the amount of $187,500 as actual damages; in favor of plaintiff, Estate of Stanley E. Cole, in the amount of $112,500 as actual damages; and in favor of plaintiff, Estate of Robert J. Conkle, in the amount of $190,830 as actual damages, and against defendants David Sandahl and Charles Rowe. Judgment entered in favor of said plaintiffs' in the amount of zero dollars as punitive damages against defendants David Sandahl and Charles Rowe.

(Filed Oct 10 1984)

Clerk
H. STUART CUNNINGHAM
(By) Deputy Clerk
/s/ William J. Stasiek
William J. Stasiek
Date OCT. 10, 1984

Minute Order Form

(1/85e)

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Case Number	80 C 5310	Date	MAY 20, 1985
Name of Assigned Judge	WILLIAM T. HART	Sitting Judge if Other Than Assigned Judge	
Case Title	DALE WALKER, et al. v. CHARLES ROWE, et al.		

MOTION: (In the following box (a) indicate the party filing the motion. e.g., plaintiff. defendant. 3d-party plaintiff. and (b) state briefly the nature of the motion being presented.)

DOCKET ENTRY: (The balance of this form is reserved for notations by court staff.)

(1) [X] Judgment is entered as follows. (2) [ ] [Other docket entry:]

Pursuant to Memorandum Opinion and Order, IT IS ORDERED that: (1) The motion of defendants Charles Rowe and David Sandahl for judgment notwithstanding the verdict is denied. (2) Plaintiff's motion for attorneys' fees and costs is granted in part and denied in part. Judgment shall enter in favor of plaintiffs and against defendants in the amount of $145,792.50.

(3) [ ] Filed motion of [use listing in "MOTION" box above]

(4) [ ] Brief in support of motion due

(5) [ ] Answer brief to motion due Reply to answer brief due

(6) [ ] Hearing / [ ] Ruling on set for at

(7) [ ] Status hearing [ ] held [ ] continued to [ ] set for [ ] re-set for at

(8) [ ] Pretrial conference [ ] held [ ] continued to [ ] set for [ ] re-set for at

(9) [ ] Trial [ ] set for [ ] re-set for at

(10) [ ] [ ] Trial [ ] Hearing held and continued to at

(11) [ ] This case is dismissed [ ] without [ ] with prejudice and without costs [ ] by agreement [ ] pursuant to [ ] FRCP 41(a)(1) [ ] FRCP 41(a)(2) [ ] FRCP 4(m) failure to serve [ ] General Rule 21 (want of prosecution)

(12) [X] DRAFT (For further detail see order [ ] on the reverse of [X] attached to the original minute order form.)

[ ] No notices required

[X] Notices mailed by judge's staff

[ ] Notified counsel by telephone

[ ] Docketing to mail notices

[ ] Mail CIV-31 form

courtroom deputy's initials

Date time received in central Clerk's Office

number of notices

date typed envelopes

date docketed

date mld notices

mailing dpty initials

Document #

— 13a —

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 80 C 5310

DALE WALKER, et al.,

Plaintiffs,

v.

CHARLES ROWE, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the motion of the defendants Charles Rowe and David Sandahl for judgment notwithstanding the verdict and the motion of plaintiffs for the allowance of attorneys' fees and costs.

I

Defendants contend that this action, which was brought to recover damages for violation of plaintiff's and decedents' rights not to be deprived of life or liberty without due process of law in violation of the Fourteenth Amendment, is precluded because Illinois state law provides an adequate post-deprivation remedy. Citing *Hudson* v. *Palmer*, ... U.S. ....., 104 S. Ct. 3194 (1984); *Parratt* v. *Taylor*, 451 U.S. 527 (1981); and *Hayes* v. *Johnson*, 578 F. Supp. 685 (E.D. Mich. 1983), defendants contend that the Illinois Worker's Compensation Act, Ill. Rev. Stat. 1979, ch. 48, § 138.8(b)4.2, provided an adequate and exclusive remedy for any injuries suffered.

For the reasons stated in this court's opinion denying defendants' motion to dismiss in this case (*Walker* v. *Rowe*, 535 F. Supp. 55 (N.D. Ill. 1981) (Aspen, J.)) the administrative remedy clearly was not exclusive. By its terms the Illinois Worker's Compensation Act did not preclude an action for a constitutional violation. The question of whether a remedy in the form of an adminis-

trative claim could be deemed an adequate post-deprivation remedy for deprivation of constitutional rights was not, however, addressed in the previous ruling of this Court passing on defendants' motion to dismiss.

As defendants state, *Hayes* v. *Johnson, supra,* held that a compensation claim was an adequate and complete post-deprivation remedy for a prison teacher who was raped by inmates. This case appears to be in point, but this Court respectfully disagrees with the conclusion in the *Hayes* case. Based on the reasoning of the Supreme Court in *Carlson* v. *Green,* 446 U.S. 14 (1980) and the holding of the Court of Appeals for the Seventh Circuit in *Bell* v. *City of Milwaukee,* 746 F.2d 1205 (1984), this Court is of the view that an administrative claim which limits the amount of compensatory damages, does not provide for punitive damages and does not provide for a jury trial is not an adequate post-deprivation remedy.

In *Carlson* v. *Green,* the Supreme Court held that a *Bivens* remedy was available against a federal official to vindicate Eighth Amendment rights even though the claim would also support a suit against the United States under the Federal Tort Claims Act. The Supreme Court stated:

> Four additional factors, each suggesting that the *Bivens* remedy is more effective than the FTCA remedy, also support our conclusion that Congress did not intend to limit respondent to an FTCA action. First, the *Bivens* remedy, in addition to compensating victims, serves a deterrent purpose. *See Butz* v. *Economou, supra,* at 505. Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States. It is almost axiomatic that the threat of damages has a deterrent effect, *Imbler* v. *Pachtman,* 424 U.S. 409, 442 (1976) (White J., concurring in judgment), surely particularly so when the individual official faces personal financial liability.

Petitioners argue that FTCA liability is a more effective deterrent because the individual employees responsible for the Government's liability would risk loss of employment and because the Government would be forced to promulgate corrective policies. That argument suggests, however, that the superiors would not take the same actions when an employee is found personally liable for violation of a citizen's constitutional rights. The more reasonable assumption is that responsible superiors are motivated not only by concern for the public fisc but also by concern for the Government's integrity.

Second, our decisions, although not expressly addressing and deciding the question, indicate that punitive damages may be awarded in a *Bivens* suit. Punitive damages are 'a particular remedial mechanism normally available in the federal courts,' *Bivens,* 403 U.S., at 397, and are especially appropriate to redress the violation by a Government official of a citizen's constitutional rights. Moreover, punitive damages are available in 'a proper' § 1983 action, *Carey* v. *Piphus,* 435 U.S. 247, 257, n. 11 (1978) (punitive damages not awarded because District court found defendants 'did not act with a malicious intention to deprive respondents of their rights or to do them other injury'), and *Butz* v. *Economou,* suggests that the 'constitutional design' would be stood on its head if federal officials did not face at least the same liability as state officials guilty of the same constitutional transgression. 438 U.S., at 504. But punitive damages in an FTCA suit are statutorily prohibited. 28 U.S.C. § 2674. Thus FTCA is that much less effective than a *Bivens* action as a deterrent to unconstitutional acts.

Third, a plaintiff cannot opt for a jury in an FTCA action, 28 U.S.C. § 2402, as he may in a *Bivens* suit. Petitioners argue that this is an irrelevant difference because juries have been biased against *Bivens*

> claimants. Reply Brief for Petitioners 7, and n. 6; Brief for Petitioners 30-31, n. 30. Significantly, however, they do not assert that judges trying the claims as FTCA actions would have been more receptive, and they cannot explain why the plaintiff should not retain the choice.

In *Carlson* v. *Green,* the Supreme Court was addressing the issue of Congressional intent with regard to preemption by a given remedy rather than whether that remedy is adequate to meet due process standards. Nonetheless, this Court believes that by analogy, and for the reasons stated in *Carlson* v. *Green,* a non-jury, administrative remedy which places a limit on the type and amount of compensatory damages and does not provide for punitive damages is not an adequate post-deprivation substitute for an action under Section 1983. See to the same effect *Bell* v. *City of Milwaukee,* 746 F.2d at 1238, n.39 and 1252 n.59 (analysis of adequacy of state law post-deprivation remedies for claims of deprivation of life without due process of law (substantive due process claim based on Fourth and Fourteenth Amendments) and of deprivation of the parents' liberty interest in the parent-child relationship (based solely on the Fourteenth Amendment)).

The Court is aware of the Supreme Court's refusal in *Parratt* to find the absence of punitive damage and a jury trial to be determinative. 451 U.S. at 544-45. However, the Supreme Court noted that "the remedies provided could have fully compensated the [injured party]." In contrast, the Worker's Compensation Act does not pur port to fully compensate an injured worker. Rather, it sets forth a schedule of discrete amounts recoverable for loss of use of parts of the body and for death. Notably, however, no compensation is allowed for pain and emotional damages which are clearly compensable items in this case. Moreover, amounts awarded under the Compensation Act are not *individualized* efforts to fully compensate, but represent an attempt to establish a compromise

between employer and employee. This compromise includes a *generalized* attempt to resolve such factors as the comparative fault of the employer and employee and the uncertainties and costs of litigation. The agenda of the Worker's Compensation Act is far broader than fully compensating individual plaintiffs, which is the primary goal of a § 1983 action.

Defendants also contend that because the jury awarded less than the Worker's Compensation Act cap in damages that this is evidence that the administrative remedy provided by Illinois law was an adequate post-deprivation remedy. Defendants forget that they insisted on informing the jury of the compensation awards granted to the plaintiffs and to the decedents' estates. This evidence was admitted without objection on the part of the plaintiffs to avoid any contention that the amounts awarded by the jury would be subject to an offset for amounts received under the Act. In effect, then, the jury was invited to award only an amount representing the difference between plaintiffs' damages and the amount already awarded under the Act. Under these circumstances, the level of the jury awards is not proof of the adequacy of the administrative remedy.

II

Defendants have moved for judgment notwithstanding the verdict pursuant to Rule 50(b) of the Federal Rules of Civil Procedure. The standard which must be followed requires that the evidence with all inferences to be reasonably drawn therefrom be viewed most favorably to the parties opposing the motion. If in a fair and impartial exercise of their judgment the jury could reach the conclusions which favored the plaintiffs, the verdict may not be set aside.

The court instructed the jury that in order to find one of the defendants deprived one of the plaintiffs of his or her life or liberty without due process of law it must find

that the defendant acted or failed to act knowing that his act or omission would endanger the plaintiff or with deliberate or reckless indifference to that plaintiff's safety. The record supports a conclusion by a reasonable jury that the Pontiac institution was unreasonably dangerous. Reasonable minds might also find, on the evidence, that after the riot began, the defendants failed to take necessary actions to quell the riot and come to the aid of the plaintiffs.

Expert and other testimony support the conclusion that conditions at Pontiac were unreasonably dangerous due to a variety of conditions, including poor or nonexistent communications, inadequately trained and understaffed personnel, overcrowded inmate conditions, and inadequate security. There were locations in the institution where officers could not be seen nor could they be heard. There is evidence that complaints and reports from officers were ignored, metal detectors were inoperable or not used, shakedowns were few, and policies with respect to deadlocks were unclear. Plaintiffs' expert testified that conditions at the institution contributed to the riot, injuries and deaths of the staff.

On the basis of the evidence presented the court concludes that the jury's verdict is supported by the evidence and cannot be set aside.

III

The defendants have incorporated by reference their arguments before and at trial with regard to their qualified immunity from damages. In *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982), the Supreme Court restricted the previous "good faith" immunity accorded to public officials to its objective component. Public officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established or constitutional rights of which a reasonable person would have known." *Davis* v. *Scherer,* 104 S. Ct. 3012, 3018 (1984) (quoting

Harlow, 457 U.S. at 818). Two principles govern the application of the *Harlow* standard to these defendants. "A reasonably competent public official is expected to know the law governing his conduct." *Bates* v. *Jean,* 745 F.2d 1146, 1152 (7th Cir. 1984) (citing *Crowder* v. *Lash,* 687 F.2d 996, 1007 (7th Cir. 1982)). The relevant time when the rights must be clearly established is the time of the violation. *Davis,* 104 S. Ct. at 3019-20.

The constitutional rights asserted by the plaintiffs are their Fourteenth Amendment rights not to be deprived of life and liberty without due process of law. It is beyond dispute that the plaintiffs' interests in life and liberty in the form of freedom from injury were clearly established at the time of the riot. Defendants argue that it was not clearly established that the type of deprivation suffered here (attack on guards by rioting inmates) constituted a deprivation by the State without due process. Although the parties have not directed the Court's attention to, and the Court has not found, a pre-1978 decision which holds squarely that based on the factual situation here a deprivation of life or liberty of prison guards without due process has occurred, the proposition was clearly established by related holdings. "'[W]hile an official has, of course, no duty to anticipate unforeseen constitutional developments,' he cannot hide behind a claim that the particular factual predicate in question has never appeared *in haec verba* in a reported opinion. If the application of settled principles to this factual tableau would inexorably lead to a conclusion of unconstitutionality, a prison official may not take solace in ostrichism." *Little* v. *Walker,* 552 F.2d 193, 197 (7th Cir. 1977), *cert. denied,* 435 U.S. 932 (1978) (citation omitted).

Long before the date of the riot at the Pontiac correctional facility, convicted prisoners were afforded protection from injury resulting from the "callous indifference" of prison officials. *See, e.g., Estelle* v. *Gamble,* 429 U.S. 97, 104-5 (1976) (deliberate indifference to serious medical needs); *Little* v. *Walker, supra* (deliberate indif-

ference to likelihood of assault by other inmates). This protection was based on the Eighth Amendments' prohibition of cruel and unusual punishment. Subsequently, the rationale of these decisions was extended to protect unconvicted detainees under the auspices of the Due Process Clauses of the Fifth and Fourteenth Amendments. *See, e.g., Spence* v. *Staras,* 507 F.2d 554 (7th Cir. 1974) (failure to protect mental hospital inmate). This Due Process Clause analysis also was applied to the liberty interests of a wide variety of persons other than prisoners. *Ingram* v. *Wright,* 430 U.S. 651 (1977) (school childrens' claim of deprivation of liberty through corporal punishment); *White* v. *Rochford,* 592 F.2d 381 (7th Cir. 1979) (children abandoned without adult supervision by police who arrested their uncle). The same analysis was also applied beyond the interest in avoiding punishment prior to conviction, to the entire spectrum of interests protected by the Due Process Clause. *Bonner* v. *Couglin,* 545 F.2d 565 (7th Cir. 1976) (prisoner's right to property).

Although admittedly borrowed from the Eighth Amendment, the broader due process analysis is not limited to prisoners. Nor have the defendants identified authority which limits the "deliberate indifference" analysis to those in custody. Although decided subsequently to the violation involved here, *White* v. *Rochford, supra* and *Bowers* v. *DeVito,* 686 F.2d 616 (7th Cir. 1982) both support the generalized application of the "deliberate indifference" standard to the injury suffered by these plaintiffs. In *Bowers,* the Seventh Circuit noted that the liability of prison officials to inmates under a "deliberate indifference" due process theory was simply one example of the more general rule that "[i]f the state puts a man in a position of danger from private persons and then fails to protect him . . . it is as much an active tortfeasor as if it had thrown him into a snake pit." 686 F.2d at 618. *See also Jackson* v. *Byrne,* 738 F.2d 1443, 1446-47 (7th

Cir. 1984) (state required to protect individuals "with whom the state had created a custodial *or other special relationship*," (emphasis added)). These cases represent a reiteration of principles well-settled prior to the Pontiac prison riot, rather than new developments in constitutional law.

Further evidence that during 1978 prison guards shared with inmates a constitutional right to protection from assault by inmates is found in those decisions limiting inmate rights. To justify limitations on prisoners rights, courts relied on the prison officials' duty to maintain "institutional security," defined in part as "ensur[ing] the safety of inmates and *corrections personnel*." *Bell* v. *Wolfish*, 441 U.S. 520, 546-47 (1979) (emphasis added). *See also Soto* v. *Dickey*, 744 F.2d 1260, 1269 (7th Cir. 1984) (citing in the same breath the need to protect both "correctional personnel" and inmates as justifying limited macing of uncooperative inmates). Hofeldian distinctions between discretionary rights and mandatory duties aside, reasonable prison officials could not expect to justify certain actions with the need to protect prison personnel and then disclaim any duty to do so when those personnel demanded such protection. "The prison officials' *responsibility* extends to the protection of the guard, as well as to the inmates. The safety of the institution's guards and inmates is perhaps the most fundamental responsibility of prison administration." *Soto*, 744 F.2d at 1270 (citing *Hewitt* v. *Helms*, 459 U.S. 460, 473 (1983)).

IV

To properly evaluate the plaintiffs' motion for allowance of attorney's fees and costs, the procedural background of this case must be examined. Plaintiffs Walker, Patchett, Thomas, D. Dill, N. Dill, and Cole filed their original complaint against defendants Governor James Thompson, Director Charles Rowe, Warden Thaddeus Pinkney, and other employees. Defendant Thompson filed a motion to dismiss which was granted on March 5, 1981.

On or about April 15, 1981, plaintiffs filed a second amended complaint adding the estate of Robert J. Conkle as a plaintiff, and adding David Sandahl, William O'Sullivan, William Shehorn, and Louis Lowery as defendants. Defendants O'Sullivan, Shehorn, and Lowery filed a motion to dismiss the first amended complaint. The motion of defendants, Sheborn and Lowery was granted January 27, 1982. Prior to trial the Court dismissed the Estate of Thaddeus Pinkney as a defendant as no legal representative for the estate existed.

At the close of plaintiffs' case, defendants moved for a directed verdict against plaintiff Natalie Dill which was granted by the court. The trial began on September 13, 1984 and was completed in 13 trial days. The jury returned a verdict on liability in favor of defendant O'Sullivan and against defendants Rowe and Sandahl. Two of the seven named defendants were found liable to six of the seven named plaintiffs. Plaintiffs in their closing argument asked the jury to award over three million dollars in compensatory damages plus an unspecified amount for certain compensatory damages, and significant punitive damages. Defendants in their closing argument suggested that the jury award in the area of $550,000.00 in compensatory damages and no punitive damages. The jury returned its verdict on October 10, 1984 in the following amounts: Dale Walker - $57,665; Danny Dill - $187,500; Sharon Patchett - $38,350; Estate of Stanley Cole - $112,500; Estate of Robert Conkle - $190,830; and the Estate of William Thomas - $120,000. The verdicts total $706,845.

The amount of the fees and costs to be awarded must be determined on the facts of each case. *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 (1983). The determination of the amount of fees and costs to be awarded is within the sound discretion of the Court. *Johnson ex rel. Johnson* v. *Brelje*, 701 F.2d 1201, 1211 (7th Cir. 1983).

In determining the amount of the award, twelve factors have been set forth to guide a court in making an award. The twelve factors are:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

See Hensley v. *Eckerhart*, 103 S. Ct. at 1937; *Muscare* v. *Quinn*, 614 F.2d 577, 579 (7th Cir. 1980).

A. Costs

Plaintiffs' costs petition which is attached to the petition as Schedule D seeks costs in the amount of $2,865.89. In this amount there are two charges for research by a law clerk in the amounts of $110.50 and $112.00 for unidentified work. Defendants suggest that a costs award of $2,642.50 would reasonably compensate counsel for his costs to which he is entitled under Section 1988. This amount represents the amount sought minus the law clerk charges for unidentified work and will be allowed.

B. Fees for Attorney and Law Clerk Time

Plaintiffs seek $217,718.58 in fees for attorney and law clerk time on this case by eight different attorneys associated with three firms and unidentified law clerks.

Jeffry Knuckles has requested an award of fees in the amount of $113,947.80 which represents 911 hours and 35 minutes at a rate of $125.00 per hour. This amount repre-

sents time charged during the period June 1, 1983 to October 20, 1984, during which time Mr. Knuckles was a sole practitioner. Terry Ekl, who represented only Danny Dill, has requested $61,229.80 which covers 498 hours charged by three attorneys in his firm and 14 law clerk hours. Fawell, James and Brooks, Mr. Knuckles' former employer has requested $45,489.58 representing 542 hours and 35 minutes of attorney time by five different attorneys at various rates and 57 law clerk hours.

According to plaintiffs' petition, a contingency fee arrangement exists between all clients and Fawell, James and Brooks, whereby the Fawell firm, is entitled to one-third of the total verdict. Such a contingency fee amounts to $235,615.00, based on the total verdict of $706,845.00. It is unclear as to whether the verdict obtained for Danny Dill ($187,500.00) is subject to this contingency contract and Mr. Ekl has not indicated to the court whether he has any contingency fee arrangement with Danny Dill.

Defendants contend that the billing rates charged for attorney time are excessive and unwarranted, and further that plaintiffs have failed to adequately set forth the qualifications and experience of each attorney to justify the rate requested. Further, the number of hours requested is asserted to be unjustified.

Plaintiffs have failed to adjust their billing rates for in court time, out of court time, and travel time. Instead counsel have applied a single universal billing rate which applies no matter what the nature of the time being billed.

During the period June 1, 1983 to October 20, 1984 Mr. Knuckles represented plaintiffs as a sole practitioner and claims a rate of $125.00 per hour for in court time, out of court time, and travel time. This case was Mr. Knuckles first federal civil jury trial, although he has considerable state trial experience.

The billing rates of two partners in Fawell, James and Brooks, of $85.00 per hour indicate that the rate of $125.00

per hour is not customary. The Fawell firm is also located in Naperville and is well established. On May 31, 1983 Mr. Knuckles' billing rate as a partner at Fawell, James & Brooks was $85.00 per hour.

Defendants suggest that a billing rate for Mr. Knuckles time as a solo practitioner of $100.00 per hour for in court time and $75.00 per hour for out of court time would be appropriate.

Connolly and Ekl is located in the same geographic area as Mr. Knuckles and Fawell, James and Brooks. Plaintiffs' petition provides a sketchy synopsis of Mr. Ekl's experience and makes reference to Mr. Connolly's experience. The petition makes no reference whatsoever to the experience of the other attorney in the firm charging time, Patrick Williams.

A rate of $125.00 per hour for Mr. Ekl and Mr. Connolly is unsupported by the petition and is not customary in light of the billing rates at Fawell, James and Brooks. Defendants suggest a billing rate of $100.00 per hour for in court time and $75.00 per hour for out of court time would be appropriate for Mr. Ekl and Mr. Connolly.

Defendants agree that $20.00 per hour is an appropriate billing rate for law clerks for all three firms. Defendants also contend that the number of hours requested by counsel for the plaintiffs is excessive. Plaintiffs' counsel has detailed the hours spent on this matter in their fee petition. However, it does not follow that the amount of time actually expended is the amount of time reasonably expended. *Copeland* v. *Marshall,* 641 F.2d 880, 891 (D.C. Cir. 1980). Counsel are not entitled to fees for matters concerning Natalie Dill, who was directed out, William O'Sullivan, who was found not guilty, and the dismissed defendants Governor Thompson, Estate of Thaddeus Pinkney, Louis Lowery, and William Shehorn.

If more than one attorney is involved, the possibility of duplication of effort along with the proper utilization of time should be scrutinized. The court has reviewed the docket entries to obtain an overview of the case activity and includes a copy of them as part of the record.

Because plaintiffs have not prevailed on all claims against all defendants they are not entitled to recover payment for all time expended. In general, to recognize the elimination of this time and some excess time the court has accepted the time eliminations proposed by the defendants for the time of Messrs. Knuckles and Ekl.

Accordingly, Mr. Knuckles total hours have been reduced from 911 to 790. Based on an in court hourly rate of $125.00 per hour for 100 hours and on an out of court rate of $85.00 the fee allowed to Mr. Knuckles is $71,150.

Mr. Ekl who represented one client and assisted Mr. Knuckles during part of the trial is allowed 80 hours in court time at the rate of $100.00 per hour and 400 out of court hours at the $85.00 per hour rate at which Mr. Ekl's firm bills his time for a total allowance of $42,000.

Utilizing $75.00 and $85.00 an hour rates and accepting the deductions proposed by defendants the law firm of Fawell, James and Brooks is allowed $30,000 for the time of its partners, associates and clerks.

Total attorneys fees allowed are $143,150. This amount also takes into account the age and experience of counsel, the difficulty of the matters presented, the time during which the matter was presented, the results obtained, the contingent fee arrangement, and awards in similar cases. The court judges all of these factors to merit average to above consideration, with the result that counsel are fairly rewarded for their efforts and the defendants are not penalized by the fees allowed. Defendants recommend that the fees be reduced to $126,614. The court believes

that the factors considered merit the relatively small increase over defendants' recommendation.

IT IS THEREFORE ORDERED that:

(1) The motion of defendants Charles Rowe and David Sandahl for judgment notwithstanding the verdict is denied.

(2) Plaintiff's motion for attorneys' fees and costs is granted in part and denied in part. Judgment shall enter in favor of plaintiffs and against defendants in the amount of $145,792.50.

ENTER:

/s/ William T. Hart
United States District Judge

Dated: May 20, 1985

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DALE E. WALKER; SHARON D. PATCHETT; MELBA JEAN THOMAS as administrator of the estate of William N. Thomas, deceased; DANNY DILL; NATALIE DILL; SANDRA N. COLE as administrator of the estate of Stanley E. Cole, deceased; ROBERT CONKLE as administrator of the estate of Robert J. Conkle, deceased, Plaintiffs,	)	
v.	)	NO. 80 C 5310
CHARLES ROWE, former director of the Department of Corrections; THADDEUS PINCKNEY, former warden, Pontiac Correctional Center; DAVID SANDALL and WILLIAM O'SULLIVAN, former assistant wardens, Pontiac Correctional Center, WILLIAM SHEHORN; LOUIS LOWERY, Defendants.	)	

MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, District Judge:

Plaintiffs are three former correctional officers, one of their wives and three administrators of the estates of correctional officers who died in an inmate riot at the Pontiac Correctional Center on July 22, 1978. Plaintiffs' cause of action is brought pursuant to 42 U.S.C. § 1983 on the theory that various state corrections officials deprived them of their constitutional rights by failing to take action to prevent the July 22, 1978, riot and its tragic consequences. Defendant William O'Sullivan, former as-

sistant warden at the correctional center and defendants William Shehorn and Louis Lowery, former correctional officers at Pontiac, have moved to dismiss this claim for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted.[1] Fed.R.Civ.P. 12(b)(1) and (6).

Plaintiffs' complaint seeks redress for defendants' alleged failure to take steps to control, if not prevent, the violence which occurred at the Pontiac Correctional Center on July 22, 1978. Although the complaint contains 29 separate allegations, the thrust of plaintiffs' claim involves defendants' failure to warn plaintiffs of an impending prison disturbance, to operate, equip and maintain the Pontiac facility in a safe manner in the months preceding the riot, to provide adequate training and supervision of prison personnel, and to promulgate and enforce sufficient safety rules in the prison as required by state law. Taken as true for purposes of this motion, *Haines* v. *Kerner,* 404 U.S. 519, 520-21, 92 S.Ct. 594 (1972), these facts do state a claim for which relief can be granted as to defendant O'Sullivan. For the reasons stated below, however, this Court holds that plaintiffs' complaint does not state a claim for which relief can be granted as to defendants Shehorn or Lowery.

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[1] Defendants also argue that Judge Grady's decision in Local 494, AFSCME v. Thompson, 79 C 5196, bars this action under the doctrines of res judicata and collateral estoppel. Although 79 C 5196 was also a civil rights action arising from the July 22 riot at Pontiac, defendants have not established that plaintiffs in this action were parties to or in privity with any of the parties in the prior litigation, Brown v. Felsen, 442 U.S. 127, 131, 99 S.Ct. 2205 (1979); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.7, 99 S.Ct. 645 (1979). Moreover, defendants have not established that the broad range of issues raised by the parties in this case are identical to the issues litigated in 79 C 5196. *Parklane Hosiery, supra* at 326 n.6. Accordingly, this Court will not dismiss plaintiffs' complaint on res judicata or collateral estoppel grounds.

Defendants argue as a threshold matter that the Court lacks subject matter jurisdiction over this case because the Illinois Workmen's Compensation Act, Ill.Rev.Stat. 1979 ch. 48, § 138.1 *et seq.*, is the exclusive remedy for all employee claims arising out of deaths or injuries incurred in the course of employment. The state statute upon which defendants rely, however, does not and could not preclude the vindication of plaintiffs' constitutional rights in a federal forum.[2] *See Hutchings* v. *Erie City and County Library Board of Directors,* 516 F.Supp. 1265, 1272-73 (W.D.Pa. 1981). State law cannot immunize the conduct of those persons who, acting under color of law, allegedly deprive others of their constitutional rights. *Cf. Martinez* v. *California,* 444 U.S. 277, 284 n.8, 100 S.Ct. 553 (1980); *McLaughlin* v. *Tilendis,* 398 F.2d 287, 290 (7th Cir. 1968). In light of the wide disparity between the breadth of plaintiffs' damage claims herein and the limited damages award provided in the Illinois Workmen's Compensation Act, Ill.Rev.Stat. 1979 ch. 48, § 138.8(b)(2) and (4.2), the effect of dismissal on this ground would leave plaintiffs without an adequate remedy for the alleged deprivation of their constitutional rights.

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[2] In relevant part, the Illinois Workmen's Compensation Act provides:

> No *common law* or *statutory* right to recover damages from the employer, his insurer, his broker, any service organization retained by the employer, his insurer or his broker to provide safety service, advice or recommendations for the employer or the agents or employees of any of them for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act, to any one wholly or partially dependent upon him, the legal representatives of his estate, or any one otherwise entitled to recover damages for such injury.

Ill.Rev.Stat. 1979 ch. 48, § 138.1(a) (emphasis added). Plaintiffs' suit, although brought pursuant to 42 U.S.C. § 1983, asserts a constitutional rather than common law or statutory right.

The essence of this action is that defendants' failure to control the situation at Pontiac deprived plaintiffs of life and liberty without due process of law as guaranteed by the fourteenth amendment. The question of whether such an allegation of wrongful inaction rises to the constitutional dimension necessary to ground a § 1983 cause of action was addressed by the Supreme Court in *Martinez.*[3]

As made clear in *Martinez,* not every injury resulting directly or indirectly from the conduct of state officials is actionable under § 1983. 444 U.S. at 281. *See also Williams* v. *Kelley,* 624 F.2d 695, 697 (5th Cir. 1980), *cert. denied,* 101 S.Ct. 3009 (1981); *Withers* v. *Levine,* 615 F.2d 158, 162 (4th Cir. 1980). The alleged commission of a state law tort, for example, will gain federal cognizance under § 1983 only when the conduct complained of is particularly egregious. *Williams, supra. See Van Horn* v. *Lukhard,* 392 F.Supp. 384, 387 (E.D.Va. 1975).

However, even if defendants' conduct herein constituted nothing more than mere negligence, this conclusion alone does not mandate the dismissal of this § 1983 action as a matter of law. *See Parratt* v. *Taylor,* ..... U.S. ....., 101 S.Ct. 1908, 1912-13 (1981). Moreover, the causal relationship between defendants' failure to act and plaintiffs' damages, although indirect, is not so remote as to require this Court as a matter of law to grant defendants'

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[3] Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

motions to dismiss.[4] *Cf. Spence* v. *Staras,* 507 F.2d 554, 557 (7th Cir. 1974). The consequence of state officials' failure to act when they had an affirmative duty to do so under state law is sufficient to support a valid § 1983 claim. *Arnold* v. *IBM,* 637 F.2d 1350, 1355-56 (9th Cir. 1981); *Clappier* v. *Flynn,* 605 F.2d 519, 533 (10th Cir. 1979); *Johnson* v. *Duffy,* 588 F.2d 740, 743-44 (9th Cir. 1978); *Sims* v. *Adams,* 537 F.2d 829, 831-32 (5th Cir. 1976).

The critical question of law relevant to these motions to dismiss, therefore, is whether any of the moving defendants had a constitutionally cognizable duty to plaintiffs to take affirmative steps to prevent or control the disturbance at the Pontiac Correctional Center on July 22, 1978.[5] The existence of any affirmative duties owed these plaintiffs can be identified by examining the nature of the

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[4] In Martinez v. California, *supra,* the Supreme Court upheld that trial court's demurrer to the complaint in a § 1983 action on the ground that the murder of a 15 year old girl was "too remote a consequence" of the defendant's decision to release the murderer on parole five months earlier. *Id.* at 285. The circumstances of the present case are substantially different. Particularly in light of the anticipated nature of the disturbance alleged in plaintiffs' complaint, this Court is not prepared to rule, as a matter of law, that the defendants' failure to act in this case is too remote a cause of plaintiffs' damages to support a § 1983 claim for which relief can be granted.

[5] Defendants cite Judge Grady's opinion in Local 494, AFSCME, *supra,* in support of the proposition that the state did not owe plaintiffs any cognizable duty to prevent or control the Pontiac riot. In his opinion, Judge Grady concluded that because the "state has not required [correctional officers] to give up their liberty and remain in the institution, [the state] does not owe them the same protections it owes to prisoners." *Id.* This conclusion, however, does not purport to establish that the state, under all circumstances, owes no cognizable duty to its correctional officers in state prisons.

relationship between the partiss involved. Although the exact nature of the relationship between plaintiffs and defendant O'Sullivan is not made clear in any of the papers filed before the Court, we are not prepared to hold on this record that the assistant warden of the Pontiac facility does not, as a matter of law, owe any affirmative duty to the correctional officers serving that prison. Indeed, at common law, the "special relationship" between an employee and his superiors imposes upon those superiors the duty to protect employees from the reasonably foreseeable attacks of third persons.[6] *See generally Hosein* v. *Checker Taxi Co.,* 95 Ill.App.3d 150, 154, 419 N.E.2d 568 (1st Dist. 1981); *Willie Cross* v. *Chicago Housing Authority,* 74 Ill.App.3d 921, 925, 395 N.E.2d 580

(footnote 5 continued)

At a minimum, the state as employer must provide its correctional officers with reasonably safe working conditions. *Cf.* American Federation of State, County and Municipal Employees v. Walker, 27 Ill.App.3d 883, 888-90, 327 N.E.2d 568 (4th Dist. 1975). *See generally* Coselman v. Schleifer, 97 Ill.App.2d 123, 126-27, 239 N.E.2d 687 (2d Dist. 1968); Mack v. Davis, 76 Ill.App.2d 88, 97, 221 N.E. 2d 121 (2d Dist. 1966); Hendricks v. Socony-Mobil Oil Co., Inc., 45 Ill.App.2d 44, 56-57, 195 N.E.2d 1 (2d Dist. 1963). Defendants' attempt to distinguish the duties imposed on the state in AFSCME v. Walker on the theory that the court was concerned solely with the safety of the residents of the school is unpersuasive. Indeed, in dissent, Judge Simkins observed that the "premise" of the court's ruling was that "the residents *and employees* of the institution have a right to be protected from physical harm." *Id.* at 890 (emphasis added).

[6] The Court is not unmindful of the broad discretion generally afforded prison officials in the administration of prison affairs. U. S. ex rel. Miller v. Twomey, 478 F.2d 701, 721 (7th Cir. 1976), *cert. denied,* 414 U.S. 1146 (1977). By denying defendant O'Sullivan's motion to dismiss, we do not mean to imply that defendants were obligated to take all the affirmative steps outlined in plaintiffs' complaint.

(1st Dist. 1979); *Whalen* v. *Lang*, 71 Ill.App.3d 83, 85, 389 N.E.2d 10 (3d Dist. 1979); Restatement (Second) of Torts, § 302B Comment e(B), 314A Comment A (1965). Whether defendant O'Sullivan satisfied such an obligation or whether his alleged inaction was so egregious under the circumstances that this claim rises to the level of a constitutional deprivation are factual questions which are more appropriately resolved on a motion for summary judgment or at trial.

The relationship between plaintiffs and defendants Shehorn and Lowery, fellow correctional officers at Pontiac, on the other hand, is not sufficient as a matter of law to support a § 1983 claim. Plaintiffs have not identified and this Court will not imply any affirmative duty on these defendants in the absence of the kind of special relationship between the parties required by state tort law. *See Fancill* v. *Q.S.E. Foods, Inc.*, 60 Ill.2d 552, 559-60, 328 N.E.2d 538 (1975); Rstmt. (Second) of Torts, § 314A (1965). A relationship between parties which does not support a tort claim under state law cannot support a § 1983 claim for which relief can be granted. As a practical matter, imposing on those defendants a legal duty to warn all other correctional officers every time a rumor of disturbance arises in the prison would almost certainly result in more confusion than caution.

For the foregoing reasons, the motion by defendants Shehorn and Lowery are granted and the motion by defendant O'Sullivan to be dismissed from this action is denied. It is so ordered.

/s/ M E A
Marvin E. Aspen
United States District Judge

Dated: 1/27/82